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In the Supreme Court of the United States

No. 73-156

THE STATE OF TEXAS,
Petitioner,

vs.

ARCHIE BURKHALTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Archie Burkhalter, prays that a Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals be denied because the opinion below is supported on an adequate State ground, that quantum of evidence sufficient to raise a *Giglio*[1] type question.

OPINION OF THE COURT BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 493 S.W.2d 214 (1973).

1. *Giglio* v. *United States*, 405 U.S. 150 (1970).

QUESTIONS PRESENTED

This case raises two issues:

1. Whether the Texas Court of Criminal Appeals' opinion holding that there was sufficient evidence to raise a jury issue as to the existence of facts determinative of the application vel non of the *Giglio* rule was an adequate State ground to bar the U. S. Supreme Court from granting its Writ of Certiorari.

2. Whether the Texas Court of Criminal Appeals' opinion holding that an *innuendo of immunity* for a prosecuting witness in exchange for his testimony raised a jury issue of bias which could be rebutted under the Texas substantive law, thus barring the U. S. Supreme Court from granting its Writ of Certiorari.

STATEMENT OF THE CASE

Respondent adopts the Statement of Facts quoted by the majority opinion of the Texas Court of Criminal Appeals as those facts germane to this appeal.

REASONS FOR DENYING THE WRIT

There is no dispute between the parties as to the scope of the *Giglio* rule. Both sides agree that that rule was correctly stated in the opinion of the Texas Court of Criminal Appeals. The dispute between the parties is over the issue whether evidentiary basis existed for making that rule apply. Petitioner in seeking this Writ of Certiorari is asking the Court to review the weight of the evidence.

This Court delineated the situations under which it would review the findings of fact by a state court in *United Gas Public Service Company* v. *Texas*, 303 U.S. 123, 82 L.ed. 702:

> "This Court will review the findings of fact by a state court (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. Kansas City S.R. Co. v. C. H. Albers Commission Co., 223 U.S. 573, 591, Northern P. R. Co. v. North Dakota, 236 U.S. 585, 593, 59 L.ed. 735, 740, 35 S. Ct. 429, L.R.A. 1917F, 1148, P.U.R. 1915C, 277 Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. Conley, 236 U.S. 605, 609, 610, 59 L.ed. 745, 747, 748, 35 S.Ct. 437, P.U.R. 1915C, 293; Aetna L. Ins. Co. v. Dunken, 266 U.S. 389, 394, 69 L.ed. 342, 347, 45 S.Ct. 129. We make that analysis, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier of the facts, but to perform our own proper function in deciding the question of law arising upon the findings which the evidence permits. Kansas City S.R. Co. v. C.H. Albers Commission Co., 223 U.S. 573, 56 L.ed. 556, 32 S.Ct. 316, supra." (82 L.ed. 716-717).

The obvious thrust of *United Gas Public Service Company, supra,* is that the U. S. Supreme Court will leave to the state courts to analyze the testimony and draw conclusions and inferences therefrom. The U. S. Supreme Court will reverse the state court decision only if the state court's findings of fact lead to a patent denial of a citizen's rights under the Federal Constitution. The majority opinion in the Texas Court of Criminal Appeals made the following observation concerning Whitehurst's testimony:

> "Surely, it must have struck the trial judge as unusual, to say the least, that a co-indictee in a murder

> case would 'run off' an attorney who suggested that he should go into open court and demand immunity before testifying. One reasonable inference to be drawn from Whitehurst's actions is that he knew of the State's plan not to prosecute, but also knew not to mention it for fear of jeopardizing the entire scheme. Whether or not this is true is not for us to decide. The point is that the jury should have been given the opportunity to judge Whitehurst's credibility for themselves. The trial court's refusal to permit disclosure of the State's plan not to prosecute Whitehurst deprived the jury of that function."

The Texas Court of Criminal Appeals felt that the testimony adduced during the trial raised the inference that Whitehurst knew about the scheme of the State to give him immunity from prosecution. The majority and dissenting opinions of the Texas Court of Criminal Appeals agree with the holding in *Giglio* with the dissent disagreeing only on the question of whether or not there were sufficient facts to invoke the *Giglio* rule. If this Court believes that the Texas Court of Criminal Appeals properly applied the teachings of *Giglio*, then the Court should not grant a Writ of Certiorari merely on the question of whether or not the facts in the case raised a jury issue that would invoke *Giglio*. Questions of inference and weight of the evidence are questions for the state courts.

Furthermore, the Texas Court of Criminal Appeals held that the jury should have been informed of the prosecution's plan to grant immunity to Whitehurst on purely State grounds. The majority opinion quotes from McCormick & Ray, *Texas Evidence*, Section 673 as to the fact that under Texas evidentiary law:

> "Where an accomplice in the crime with which accused is charged testifies for the prosecution this is

> a circumstance affecting his credibility. It indicates a probability that he is seeking or has been promised favor at the hands of the State."

It is clear that under Texas law the evidentiary threshold to invoke the *Giglio* rule is less than that which the U. S. Supreme Court has yet required under Federal Constitutional standards. *Cf., Jackson* v. *State,* 482 S.W.2d 864 (Tex. Cr. 1972); *Ogburn* v. *State,* 101 Tex. Cr. R. 180, 274 S.W. 638 (1925); *Curry* v. *State,* 72 Tex. Cr. R. 463, 162 S.W. 851 (1914). The Court in *Curry, supra,* wrote:

> "Great latitude is allowed in asking questions on cross-examination. A witness may be asked any question, the answer to which may have a tendency to affect his credibility. And if he denies anything that would show a motive for, or animus to, testify against a party, it may be shown by other witnesses and by *independent facts.*" (emphasis added) (page 857)

It is apparent from the opinion of the Texas Court of Criminal Appeals that it did not reverse the judgment of conviction against the Respondent due to the coercive whiplash of *Giglio.* Even without the teachings of *Giglio, supra,* it is apparent that the Texas law of evidence would have allowed the Respondent to examine the State as to their plans to grant immunity to Whitehurst in exchange for his testimony. That holding is an independent and adequate state ground for the decision of the Texas Court of Criminal Appeals of which Petitioner here complains. Therefore, no proper basis exists for this Court's reviewing that decision. *Cf. Fox Film Corp.* v. *Muller,* 296 U.S. 207, 80 L.ed. 158 (1935).

CONCLUSION

For the reasons stated above, a Writ of Certiorari should not issue to review the judgment and opinion of the Court of Criminal Appeals of Texas because the opinion of that Court can be sustained on an adequate state ground.

Respectfully submitted,

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By: RICHARD J. CLARKSON
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Richard J. Clarkson, attorney for Respondent, do hereby certify that a copy of the above and foregoing Brief of Respondent has been served by placing the same in the United States mail, postage pre-paid, on this the 12th day of October, 1973, to the following address: Lonny F. Zwiener, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

RICHARD J. CLARKSON